

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

APR 8 3 21 PM '93

DISPATCHED BY MM Docket No. 93-102 ✓

In re Application of

Americom, A California
Limited Partnership

KHTZ(AM), Truckee, CA

BP-871007AI

For Construction Permit to
Change Community of License
and Transmitter Site

HEARING DESIGNATION ORDER

Adopted: March 31, 1993;

Released: April 8, 1993

By the Chief, Mass Media Bureau:

1. The Chief, Mass Media Bureau, has before him for consideration the above-captioned application filed by Americom, a California Limited Partnership, licensee of KHTZ(AM), Truckee, California ("Americom").¹ This application (File No. BP-871007AI) is for a construction permit to change the community of license and the transmitter site of KHTZ(AM) from Truckee, California, to Sparks, Nevada. Americom seeks to change its community of license, contending that it has been unable to find a

suitable transmitter site from which to serve Truckee after being evicted from its licensed site in 1983.² On March 28, 1988, Constant Communications of Nevada, Inc. ("Constant"), filed a petition to deny Americom's application.³ Americom filed a response to Constant's petition on May 2, 1988. Constant requested an extension of time to reply to Americom's response, which was opposed by Americom.⁴

2. In its petition, Constant requests that Americom's application be denied. Constant alleges that KHTZ(AM)'s proposed relocation violates Section 307(b) of the Communications Act of 1934, as amended, because the removal of KHTZ(AM) from Truckee to Sparks would leave Truckee without local radio service while Sparks is the community of license for both KPLY(AM) and KKMR-FM.⁵ Constant also alleges that Americom has failed to provide any documentation for its claim that it cannot find a suitable site for KHTZ(AM) in the Truckee area. Constant supports this allegation with a letter from a local real estate agent which details available sites for radio facilities in and around Truckee.⁶

3. In its response to Constant's petition, Americom states that there are no sites in Truckee which are suitable for KHTZ(AM). Americom characterizes Constant's contentions regarding the availability of sites as hearsay and states that the real estate agent has no competence to determine which sites may be suitable for radio transmitter facilities. Americom asserts that after being evicted from its licensed site ("Site 1"), it received a special temporary authority from the Commission to broadcast from a site near Truckee ("Site 2") which did not cover Truckee with a nighttime signal. In an effort to relocate permanently at Site 2, Americom attempted to modify its construction permit, which application, as noted, was denied. Finally, Americom argues that Section 307(b) of the Communications Act of 1934, as amended, does not preclude the grant of an application where, as here, suitable alternative sites are unavailable.⁷

¹ The former call sign for KHTZ(AM) was KHTX(AM).

² Americom also has pending an application for the license renewal of KHTZ(AM) (File No. BR-900731D4). KHTZ(AM) went silent in 1988. Americom had previously filed an application to relocate its transmitter site (File No. BMP-850130AD). At that time, Americom was operating under special temporary authority from the site proposed therein. The application was dismissed because nighttime coverage of Truckee could not be achieved from the proposed site.

³ At the time of the filing of the petition, Constant was the licensee of KQLO(AM), Reno, Nevada. Constant asserted that it had standing to file the present petition to deny under 47 U.S.C. Sec. 309(d) because KHTZ(AM)'s proposed relocation to Sparks, Nevada would place KHTZ(AM) in the Reno radio market and that the proposed contours of KHTZ(AM) would overlap the contours of KQLO(AM). Consequently, the two stations will compete for listeners and advertisers. *See, e.g., American Homes Stations, Inc.*, 64 FCC 2d 955 (1977). On August 29, 1989, the Commission granted an assignment of the KQLO(AM) license from Constant to Pacific Telecom, Inc. ("PTI") (File No. BAL-890717EE). By letter dated March 24, 1993, PTI requested that the petition to deny filed by its predecessor-in-interest, Constant, be withdrawn. This request for withdrawal, however, does not preclude consideration of the issues raised by Constant as they relate to the public interest, convenience and necessity.

⁴ Although Constant's reply was filed outside the pleading cycle described in 47 C.F.R. Sec. 1.45, it is considered to the

extent that it addresses issues relevant to our consideration of this application. We also note that the one-week delay created no hardship for Americom in this case.

⁵ KHTZ(AM), operating from Americom's proposed site, would not cover Truckee with 5 mV/m service, daytime, or interference-free service at night.

⁶ In this letter, Bryan J. Drakulich, a real estate agent in the Truckee area, states that there are locations available in the Truckee area suitable for a radio transmitter site. Americom asserts that the realtor's letter is "worthless because it does not address the engineering aspects" of such locations, and, consequently, requests that the Commission dismiss the entire petition as a sham or "strike" pleading. The Commission, however, will not dismiss a petition to deny as a "strike" or sham petition unless it appears that the petition is "patently frivolous or wholly vexatious." *Faulkner Radio Corp. v. FCC*, 557 F.2d 866 (D.C. Cir. 1977). In the present case, the Constant petition raises legitimate issues, including those relating to Section 307(b) of the Communications Act of 1934, as amended, which are relevant to our consideration of applications for change of community of license. *See, e.g., Ark-Valley Broadcasting Company, Inc.*, 15 FCC 818 (1951). We therefore cannot conclude that the raising of such issues is frivolous or vexatious so as to warrant dismissal of the pleading.

⁷ Americom also contends that the Commission "suggested" that KHTZ(AM) file an application to change its community. This apparently refers to the November 7, 1986 letter of the Chief, Audio Services Division, which denied a petition for

4. Constant filed a reply to Americom's response, asserting that there is another site ("Site 3") in the Truckee area which Americom has failed to consider. Constant states that Americom was granted a building permit for a 200-foot tower on Site 3 in 1983, after which time Americom applied for a local zoning variance to increase the tower height to 400 feet while allowing its permit for a 200-foot tower to expire. According to Constant, citing relevant records from the Nevada County Planning Department, Americom thereafter "voluntarily abandoned" that site.⁸

5. On June 28, 1989, the Commission staff requested that Americom provide additional information regarding its efforts to find a suitable site from which to serve Truckee, with specific emphasis concerning its efforts to secure a permit for Site 3. Americom responded by letter dated July 28, 1989, as supplemented on August 17, 1989, asserting that Americom was granted a variance for Site 3 by the Nevada County Planning Commission but was later notified that inadequate notice had been given to the adjacent site owners. At that time, Americom concluded that the variance was not authorized and now argues that an effort to secure a building permit for a tower of 200 or 400 feet would presently be zealously opposed by the local residents.⁹ Americom also contends that zoning in Truckee, as part of the Lake Tahoe Basin, is very strictly regulated.

6. Americom, however, fails to provide support for its contention that all sites capable of serving Truckee are, in fact, within the strict zoning regulations of the Lake Tahoe Basin, or are otherwise precluded by local zoning constraints. Americom proposes Sparks, Nevada, as the community of license because it is the closest community to Truckee, and contends that its population of 35,300 is sufficient to support a radio station. Moreover, in its July 28, 1989 response, Americom contends that every community nearer to Truckee consists of nothing "more than a grouping of condominiums, ski areas and a general store." In this connection, however, we note that Americom has failed to provide any evidence to support its contention that the municipalities located between Truckee, California, and Sparks, Nevada, are not licensable communities under Section 307(b).

7. In view of the foregoing, we believe a substantial and material question exists as to whether a transmitter site is available to Americom which would enable it to serve Truckee. Consequently, an appropriate issue will be designated. In the event that Americom meets its burden of establishing that an appropriate transmitter site is not available, then it will not be necessary to adjudicate the 307(b) issue, discussed below.

reconsideration of the prior modification application which proposed Site 2 for KHTZ(AM)'s transmitter. In that letter, Americom was informed that it had failed to support its showing for a waiver of Section 73.24(j) by documenting the unavailability of sites offering greater coverage than the proposed site. Americom was also informed that it had failed to address other "possible alternatives such as changing community of license." The letter thus noted that Americom had failed to demonstrate that it had examined all the possible alternatives available to it, and the consequences thereto, before requesting a modification which would require a waiver of 47 C.F.R. Sec. 73.24(j). It was not suggested that Americom apply for a change in the community of license of KHTZ(AM) which would result in an abandonment of service to Truckee.

⁸ Constant supports this allegation by producing a September

8. *Section 307(b) Considerations.* In *Ark-Valley Broadcasting Company, Inc.*, 15 FCC 818 (1951), the Commission held that Section 307(b) of the Communications Act must be considered when a licensee seeks to change its community of license.¹⁰ Under a Section 307(b) analysis, the "equitable and efficient factors relevant to any particular proceeding can be determined only with regard to the particular facts of the case, and they must be weighed and balanced to reach an ultimate conclusion as to which applications would best serve the public interest, convenience and necessity." *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603, 2608 (1961). In this regard, we note that the Commission has expressed its concern with respect to the removal of the sole aural transmission service from a community. *See In the Matter of Amendment of the Commission's Rules Regarding FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989); *recon. granted in part and denied in part*, 5 FCC Rcd 7094 (1990). In light of this precedent, we believe a substantial and material question exists as to whether, pursuant to Section 307(b) of the Communications Act of 1934, as amended, grant of the instant application would serve the public interest.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned application (BP-871007AI) is DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether a transmitter site is available to the applicant which would allow the applicant to serve its present community of license.
2. To determine whether, pursuant to Section 307(b) of the Communications Act of 1934, as amended, a grant of the application would provide a fair, efficient, and equitable distribution of radio service.
3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

10. IT IS FURTHER ORDERED, That the request of Pacific Telecom, Inc. to withdraw the petition to deny filed by Constant Communications of Nevada, Inc. IS GRANTED, to the extent indicated herein.

13. 1984 letter from the Nevada County Planning Department to KHTZ(AM) granting KHTZ(AM)'s request to withdraw its application for a 400 foot tower, which would have replaced the 200-foot tower that had previously been approved.

⁹ In its reply to Americom's response, Constant states that a tower of only 150 feet would satisfy the coverage requirements of 47 C.F.R. Sec. 73.189(b). An engineering study prepared by the Commission's staff supports Constant's contention.

¹⁰ The Commission explained that Section 307(b) was applicable because "applications for the removal of stations from one community to another in effect constitute alternative requests, one for a new license to operate in a new community, and the other for authority to continue operation at the existing location Hence, we have a clear case of demand for the station by two communities" 15 FCC at 820.

11. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to the foregoing issues is on Americom, a California Limited Partnership.

12. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the applicant and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's rules, in person or by attorney, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's rules, give notice of the hearing within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau